No. 1028

In the

Supreme Court of the United States

OCTOBER TERM 1961

GEORGE S. ATKINSON ET AL.,

Petitioners,

v.

CITY OF DALLAS,

Respondent.

Application for Writ of Certiorari to the Supreme Court of Texas

PETITION

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of Texas, included in the Order denying Petitioners Application for Writ of Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, is unreported, but is hereinafter set forth. (App. A, infra, p. 1.)

The Opinion of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas is unreported but is reproduced herein. (App. A, pp. 2-16.)

JURISDICTION

The Judgment of the Supreme Court of Texas which is sought to be reviewed was dated March 14, 1962, and denied Petitioners the right to make a Motion for Rehearing. (App. A, infra, p. 1.) This Judgment found no reversible error in the Judgment of the Court of Civil Appeals affirming the trial court's granting of a Motion for Summary Judgment by Respondent, which Summary Judgment denied the Petitioners' prayer for an injunction against the construction and operation of a new airport instrument runway at Love Field, a Municipal Airport at Dallas, Texas; Petitioners had sought such injunction on the grounds that the planned construction and use was in violation of the rights guaranteed to them by the Constitution of the United States and the Constitution and Statutes of Texas.

The Jurisdicion of this Court to review by Writ of Certiorari the aforementioned Judgment is conferred by 28 U. S. C. 1257, the State Court's Judgments being in conflict with this Court's construction of the Fourteenth Amendment to the United States Constitution as expressed in Griggs v. County of Allegheny, opinion rendered March 5, 1962, in cause No. 81, October Term, 1961, 7 L. Ed. 2d 585.

QUESTIONS PRESENTED

1. May the Respondent City of Dallas "take" air easements over Petitioners' residential properties, through construction and use of a new runway for jet aircraft operations at its municipal airport, without *first* having acquired and paid for such air rights as required by the United States and Texas Constitutions? Are Petitioners entitled to an injunction against such illegal seizure?

2. Does the refusal of the Courts of the State of Texas to enforce the provisions of the Constitution and Statutes of Texas relative to the issuance of bonds, compliance with Federal Airport regulations in construction of airports, creation of public nuisances, right to jury trial and arbitrary and capricious action by Municipal authority, constitute an abridgement of Petitioners' privileges and immunities, a deprivation of their rights to life, liberty and property, and a denial to them of equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States?

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States, Fourteenth Amendment: "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal

protection of the laws." (U.S.C.A. Constitution, Art. 1, p. 49.)

Constitution of the United States, Fifth Amendment: "• • • • Nor shall private property be taken for public use, without just compensation." (U.S.C.A. Constitution, Art. 1, p. 47.)

Texas Constitution, Article 1, Section 15: "The right of trial by jury shall remain inviolate." (Vernon's Texas Constitution, Vol. 1, p. 5.)

Texas Constitution, Article 1, Section 17: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person; and, when taken, except for the use of the State, such compensation shall be first made, or secured by a deposit of money; and no irrevocable or uncontrollable grant of special privileges or immunities, shall be made; but all privileges and franchises granted by the Legislature, or created under its authority shall be subject to the control thereof." (Vernon's Texas Constitution, Vol. 1, p. 6.)

Texas Constitution, Article 1, Section 19: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." (Vernon's Texas Constitution, Vol. 1, p. 6.)

Texas Constitution, Article 3, Section 52: "The Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the

State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such croporation, association or company; * * *." (Vernon's Texas Constitution, Vol. 1, p. 28.)

Texas Constitution, Article 11, Section 3: "No county, city, or other municipal corporation shall hereafter become a subscriber to the capital of any private corporation or association, or make any appropriation or donation to the same, or in anywise loan its credit; but this shall not be construed to in any way affect any obligation heretofore undertaken pursuant to law. (Vernon's Texas Constitution, Vol. 1, p. 88.)

Texas Constitution, Article 11, Section 5: "* * * no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon; * * *." (Vernon's Texas Constitution, Vol. 1, p. 88.)

Texas Constitution, Article 11, Section 7: "But no debt for any purpose shall ever be incurred in any manner by any city and county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund; * * *." (As amended Nov. 8, 1932, Vernon's Texas Constitution, Vol. 1, p. 89.)

United States Code, Title 49, Section 1301, Subsection 24: "Navigable airspace" means airspace above the minimum altitudes of flight prescribed by regulations issued

under this chapter, and shall include airspace needed to insure safety in take-off and landing of aircraft."

Revised Statutes of Texas, Article 46d-2: "General powers of municipalities in the establishment, acquisition, operation and maintenance of airports and air navigation facilities (a) * * * For such purposes the municipality may use any available property that it may now or hereafter own or control and may, by purchase, gift, devise, lease, eminent domain proceedings or otherwise, acquire property, real or personal, or any interest therein including easements in airport hazards or land outside the boundaries of an airport or airport site, as are necessary to permit safe and efficient operation of the airport or to permit the removal, elimination, obstruction-marking of obstruction-lighting of airport hazards or to prevent the establishment of airport hazards. * * *

(d) Limitation on Design and Operation of Air Navigation Facilities. All air navigation facilities established or operated by municipalities shall be supplementary to and coordinated in design and operation with those established and operated by the Federal and State governments." (Vernon's Texas Civil Statutes, Vol. 1, pp. 194-195.)

Revised Statutes of Texas, Article 46d-7: "(b) Conformity to Federal and State Law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards

established pursuant thereto." (Vernon's Texas Civil Statutes, Vol. 1, pp. 197-198.)

Revised Statutes of Texas, Article 46d-9: "Bond issues-financing acquisition costs and improvements * * *. The cost of planning and acquiring, establishing, developing, constructing, enlarging, improving, or equipping, an airport * * * may be paid for wholly or partly from the proceeds of the sale of bonds of the municipality, as the governing body of the municipality shall determine. For such purpose a municipality may issue general or special obligation bonds, revenue bonds or other forms of bonds, secured or unsecured, including refunding bonds, and levy taxes to provide for the interest and sinking funds of any bonds so issued, the authority hereby given for the issuance of such bonds and levy and collection of such taxes to be exercised in accordance with the provisions of Title 22 of the Revised Civil Statutes of Texas, 1925, Article 701 et seq., and Acts amendatory thereof or supplementary thereto. * * *." (Vernon's Texas Civil Statutes, Vol. 1, p. 198.)

Revised Statutes of Texas, Article 701: "Shall hold election. The bonds of a county or an incorporated city or town shall never be issued for any purpose unless a proposition for the issuance of such bonds shall have been first submitted to the qualified voters who are property tax payers of such county, city or town." (Vernon's Texas Civil Statutes, Vol. 2, p. 186.)

Revised Civil Statutes of Texas, Article 702: "Question submitted. In all cases when the governing body of a county, city or town shall order an election for the issuance

of the bonds of the county, city or town or of any political subdivision or defined district of a county, such body shall at the same time submit the question of whether or not a tax shall be levied upon the property of such county, city or town, political subdivision or defined district for the purpose of paying the interest on the bonds and to create a sinking fund for the redemption of the bonds. (Vernon's Texas Civil Statutes, Vol. 2, p. 190.)

Revised Civil Statutes of Texas, Article 1269h: "Sec. 2 (a) For the purpose of condemning or purchasing, either or both, lands to be used and maintained as provided in Section 1 hereof, and improving and equipping the same for such use, the governing body of any city or the Commissioners Court of any County falling within the terms of such Section, may issue negotiable bonds of the city or of the county, as the case may be, and levy taxes to provide for the interest and sinking funds of any such bonds so issued, the authority hereby given for the issuance of such bonds and levy and collection of such taxes to be exercised in accordance with the provisions of Chapter 1 of Title 22 of the Revised Civil Statutes of 1925."

Charter of the City of Dallas, Section 288: "BOND LIMIT.—The City of Dallas shall have the right and power to borrow money on the credit of the City for permanent public improvements or for any other legitimate municipal purpose, as may be determined by the Governing Body and to issue bonds of the City therefor, to bear interest not exceeding five (5 per cent) per centum per annum, payable

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Article 701 et seq." (Vernon's Texas Civil Statutes, Vol. 2A, p. 750.)

semi-annually at such places as may be designated; provided that the total bonded indebtedness of the City shall never exceed the sum of One Hundred Thirty-Five Million ($135,000,000) Dollars, and any issue of bonds in excess of said sum shall be void as to such excess.

Charter of the City of Dallas, Section 291: "Purpose for which Bonds may be issued — * * * The enumeration in this section of purposes for which bonds may be issued shall never be construed as a limitation on the power and authority of the City to issue bonds for any permanent public improvement, or any other legitimate municipal purpose, but the City of Dallas shall have authority to issue bonds, *when authorized by the taxpaying voters*, for any purpose for which a city may issue bonds under the Constitution and laws of this State.

STATEMENT OF THE CASE

Love Field is a Municipal Airport lying wholly within the City of Dallas, Texas, completely surrounded by substantial residential and industrial development. This Airport, owned and operated by Respondent City, has two existing runways, an instrument runway running northwest and southeast, and a north-south runway for visual operations. Commercial jet aircraft began regularly scheduled operations from the existing runways at Love Field in July of 1959. In March of 1960, the Federal Aviation Agency rejected Respondent City's Application for Federal funds to be used for construction of a new runway, 8,000' long, situate 3,000' to the Southwest and parallel to the existing northwest-southeast runway; reasons given by the FAA for the rejection of the

request were stated to be Respondent's inability to meet Federal safety standards and financial requirements.

In March of 1961, the City Council of the Respondent City of Dallas approved construction of a new 8,800′ instrument runway, to be built 3,000′ to the southwest of and parallel to the existing northwest-southeast runway. The City provided for the issue, without an election, of $8,000,000 of Revenue Bonds, payable from airport revenues, out of which proceeds the cost of construction was to be paid for. Contract for construction was to be let April 3, 1961 and acceptance of bond bids was scheduled for April 17, 1961.

On April 3, 1961, Petitioners suing in their own behalf, *and in behalf of a Class consisting of the home owners, families and individuals who live, work, reside and attend schools, churches and other community centers embraced within the approach areas of the proposed new runway,* prayed for a temporary injunction and, upon final hearing, a permanent injunction against Respondent's use and construction of the proposed runway.

After denial of Petitioners' application for a Temporary injunction, Respondent moved for Summary Judgment (Tr. 59027-B, p. 79) and Petitioners filed their *verified* First Amended Original Petition. (App. B, infra, pp. 1-21) Said Petition prayed for an injunction against the construction and use of said new runway by Respondent on the following grounds:

(1) That Respondent was threatening to "take" and "seize" air rights of Petitioners without *first* compensating them therefor, in violation of the provisions of the Constitu-

tions of the United States and Texas, and the Statutes of Texas; (Par. 7, 8)

(2) That the proposed construction and use of said new runway would cause irreparable damage to Petitioners through creation of conditions effecting their lives and property, to their detriment, through operation of jet aircraft in the approach areas over their property; (Par. 12)

(3) That the proposed construction of said runway was ultra vires and in violation of Texas Statutes requiring such construction to conform to Federal Regulations and Standards of Safety; (Par. 9, 10, 11)

(4) That construction and use of said runway would create a public nuisance which is subject to injunction; (Par. 13)

(5) That construction of said runway was not in the public interest, but contrary thereto; that said runway was not a public convenience or necessity and that the action of Respondent's City Council was arbitrary and capricious; (Par. 14, 15)

(6) That the proposed issue of bonds, for financing said construction was unconstitutional, illegal and void under the relevant provisions of the Constitution and Statutes of the State of Texas and the Charter of the City of Dallas. (Par. 16)

To the foregoing Amended Petition, Respondent filed a verified Answer (Tr. 59027-B, pp. 84-101) setting up a General Denial and defenses including:

(a) the conformity to Federal Standards of construction required by Texas Statutes was inapplicable because Federal

funds were not being used; Federal approval of utilization of air space would permit operation of the new runway by Respondent without violation of Federal or State regulations; (Par. II, V, VI)

(b) the landing or take-off of any aircraft or jet upon the proposed runway would not "seize" or "take" Petitioners' air rights, and if "damage" was sustained Petitioners had an adequate remedy at law; no law required condemnation and payment of damages prior to building the runway; (Par. III, IV)

(c) Petitioners could not question the action of the City Council in authorizing said runway for any reason; (Par. IX, X)

(d) that no election was necessary to authorize issuance of the revenue bonds, and such bonds were not within the prohibitions of the constitutional, statutory and charter limitations on debt; (Par. XII)

(e) the Federal Aviation Agency controls all operations at Love Field and the City is without jurisdiction; (Par. XII)

(f) the proposed runways conforms to Federal Standards of construction; (Par. XIV)

(g) Petitioners were estopped, and barred by the Statute of Limitations from claiming an injunction.

Respondent filed a Motion and Supplementary Motion for Summary Judgment, *neither being verified*, and Petitioners filed a First Amended Supplemental Petition, *verified*, (Tr.

590 27-B, p. 103) and an answering *affidavit* to Defendant's Motions for Summary Judgment. (Tr. 59027-B, p. 106)

The Trial Court granted Respondent's Motions for Summary Judgment, denying Petitioners a permanent injunction: (Tr. 59027-B, p. 109).

The Court of Civil Appeals overruled Petitioners' Point of Error, predicated upon the unconstitutional seizure and taking of Petitioners' air rights, without compensation, in the following language:

"In their first and seventh points on appeal appellants assert that the trial court erred in holding as a matter of law that the proposed construction of the runway is not a threatened taking of appellants' property rights without compensation in violation of the provisions of the Constitution of the United States and of Texas and of the Texas Statutes. More particularly appellants claim that the City is threatening to seize and take the air rights over appellants' property through the construction and use of the nearby runway without compensation and without condemnation or purchase; and that they will suffer irreparable damage with no adequate remedy at law.

Appellants say that the proposed construction and use of the runway violates the 14th Amendment to the Constitution of the United States, Art. 1, §§ 17 and 19 of the Constitution of the State of Texas, and the following State Statutes: Arts. 46d-2, 46e-13, 3268, and 3269 V.A.T.S.

Art. 46d-2 V.A.C.S. of the Municipal Airports Act, enacted in 1947, authorizes municipalities to establish, acquire

and maintain airports. The Act took the place of certain prior existing statutes. Art. 46d-15 of the Act expressly declares that the exercise of the powers so granted shall be considered public and governmental functions. In City of Corsicana v. Wren, 159 Tex. 202, 317 SW 2d 516 the Supreme Court of Texas held that the said declaration in the statute was not violative of Arts. 1, §§ 13 and 19 of the Constitution of the State of Texas or the 14th Amendment of the Constitution of the United States. The Court further held that the City of Corsicana was immune from liability for the negligence of its employee in the operation of its airport.

Appellants allege that if the runway is constructed airplanes will fly over their property, causing noises, vibrations and disturbances which will expose appellants to permanent mental and physical injury, and do irreparable damage to their property due to increased insurance rates, reduced rental values, etc. This according to appellants, constitutes a taking of their property without compensation and without exercising the power of eminent domain.

The position taken by appellants is that Art. 46e-13 V.A.C.S. makes it the duty of the City to condemn airspace which cannot be provided for by the Airport Zoning Statute, Art. 46e-3, V.A.C.S. We think these statutes deal only with landing and take-off hazards and the elimination of present and future obstructions to the approach and departure of aircraft. There is no proof that approach hazards to aircraft exist now or are likely to exist on the properties of Appellants, consequently Art. 46e-13 is not applicable.

We cannot agree with Appellants that the facts alleged by them constitute a taking of their property as contemplated by Art. 1, § 17 of the Constitution of the State of Texas and the State Eminent Domain Statute. The proposed runway will be wholly within the boundaries of Love Field Airport and wholly on land owned by the City. There is evidence in the record that appellants' properties lie 2200 feet or more from the runway. None of appellants own any part of the ground on which the runway will be located. It is not claimed that the City will take over appellants' property by actual physical possession."

"There is a difference between a taking of property and a damaging of property. The difference is discussed in McCammon & Lang Lbr. Co. v. T & B V Ry. Co., 104 Tex. 8, 133 SW 247. In that case, speaking of the meaning of "taking" the Court said:

> 'Whether the compensation is first to be made must of course, depend upon the answer to the question whether or not there is to be a taking. Whatever may be the full meaning of the words 'property' and 'taking', in the Constitution, there is no escape from the conclusion that the first includes the fee-simple title to the thing owned, whether it be burdened with an easement or not, and that the latter includes the appropriation of that thing, or of some interest or estate in it, by actual physical possession, such as exists when a railroad is constructed and operated upon it. G.C. & S.F. Ry. Co. v. Lyons, 2 Willson, Civ. Cas. Ct. App. § 139 and authorities cited.'

"in this case the City does not propose to take actual physical possession of any of appellants' properties."

"We do not hold in this opinion that appellants have an action for damages, for that question is not before us. However, we do hold that if appellants have a cause of action at all, it is for damages to their property, not for a taking of their property within the meaning of the Constitution and Eminent Domain Statutes. (App. A, infra, pp. 3-6.)

Petitioners, by Motion for Rehearing, strongly protested the Court's distortion of their claims in the opinion rendered, and said Motion being overruled the following Points of Error were raised before the Supreme Court of Texas:

"1. The trial court and the Court of Civil Appeals erred in denying Petitioners the right of trial by jury of controverted issues of fact, and in resolving such issues against Petitioners, which error constitutes a denial of due process and equal protection of law under the guarantees of the United States and Texas Constitutions.

2. The inferior courts committed error in denying an injunction against the threatened seizure of Petitioners' air rights without compensation and in violation of the provisions of the Constitution of the United States and the Constitution and Statutes of the State of Texas.

3. The Court of Civil Appeals committed error in refusing to hold the Texas Municipal Airports Act unconstitutional to the extent that it authorizes the expenditure of public funds and the lending of public credit in aid of private commercial airlines, and in denying petitioners' request for injunction, such action being a denial of due process and the equal protection of law as guaranteed by the United States and Texas Constitutions.

4. The Court of Civil Appeals erred in refusing to enjoin the violation of the constitutional and statutory provisions against issuance of airport revenue bonds without authorization by election, in excess of established limits of bonded indebtedness, which refusal constitutes a denial of due process and equal protection of law guaranteed by the United States and Texas Constitutions.

5. The Court of Civil Appeals erred in denying an injunction against construction of the proposed runway through applying the law applicable to abatement of an existing nuisance, to the exclusion of the law applicable to the case, the right to enjoin creation of a nuisance, all in violation of Petitioners' right to due process and equal protection of the law as guaranteed by the Constitution of the United States and of Texas.

6. The Court of Civil Appeals erred in refusing to enjoin the violation of the provisions of the Texas Municipal Airports Act, if constitutional, requiring that all Municipal Airport construction must comply with and conform to federal standards and regulations, which refusal constitutes a denial of due process and the equal protection of law guaranteed by the United States and Texas Constitutions.

7. The Court of Civil Appeals erred in denying the Petitioners' right to jury trial of the questions as to whether or not the proposed runway was a necessary public improvement, and whether or not the action proposed by the Respondent City was arbitrary and capricious, thereby denying to Petitioners the right of due process and equal protection of

law guaranteed by the Constitutions of the United States and the State of Texas." (Tr. Application for Writ of Error, No. 8868, pp. 5-7.)

ARGUMENT OF SUBSTANTIAL QUESTIONS

The Petitioners, suing in their own behalf, *and in behalf of a class consisting of all home owners, families and individuals who live, reside and attend schools, churches and community centers in the area, embraced within the approach areas* of a new instrument runway, proposed to be built at Love Field, Dallas, Texas, sought an injunction against the construction and *use* of such runway on grounds hereinbefore stated. (Supra, pp. 10-11.)

It is conceded by Respondent, and established by the opinion of the Court of Civil Appeals (Supra, p. 15) that should the threatened action of the Respondent City constitute a "taking" of property, then such action would be subject to injunction under the Constitution and Statutes of Texas until compensation for such threatened seizure be first made.

However, the Texas Court denied the injunction on the theory that no actual seizure of physical property was involved, and held, as a matter of law, that the movement of commercial air traffic, at the low altitudes required for take-off and landing of all types of aircraft, including jets, constituted "damage" and not a "taking". The Respondent admitted not having acquired airrights over Petitioners' property, which the record shows includes land and buildings

lying within a few hundred feet of the ends of the proposed runway, when property of the "Class" is considered.

Respondent defended against injunction, claiming no "taking", and alleging that the Congress of the United States, through the enactment of Section 1301, 1241 of Title 49 U.S.C., had included as "Navigable Airspace", airspace needed to insure safety in take-off and landing of aircraft, asserted that Petitioners would not be entitled to either injunction or damage because of this statute's placing air rights in the public domain. This defense was sustained by the Texas Courts, which held that the enactment of this statute nullified the ruling of this Court made in United States v. Causby, 328 U. S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206, and further distinguished that case as involving only damages, not injunction.

Respondent further contended that if the use of said runway should result in a "taking" or "damage", the responsibility therefor would not be that of the Respondent, owner and operator of Love Field, but would as a matter of law be the responsibility of the United States Government and/or the airlines flying the planes. This position was approved by the Texas Courts upon the authority of *City of Newark v. Eastern Airlines, 159 Fed. Supp. 750*, and *Bourland v. City of San Antonio, 347 S. W. 2d 660.*

Respondent further took the position that, since the construction of the runway was to be made wholly on land owned by the City, there would be no "taking" or "seizure" of Petitioners' rights, and that since the "taking" or "seiz-

ure" of air rights would be effected by airlines operating under the control of the Federal Aviation Agency, the Respondent City would have no responsibility for such "taking" and no obligation to acquire the rights in the "approach areas". This contention was also sustained by the Texas Courts.

Petitioners submit that the cited ruling on the contentions of the Respondent are in direct conflict with the decisions of this Court in *United States v. Causby*, supra, and in *Griggs v. County of Allegheny, 7 L. Ed. 2d 585, Mar. 5, 1962.*

In the Causby case this Court held that individual aircraft flights "took" property in the constitutional sense by merely going over it; in the Griggs case it was held that low landing and take-off of flights making property undesirable and unbearable for residential use constituted a "taking" which must be compensated for.

The Griggs case wholly repudiated the argument, accepted by the Texas Courts in the decision herein, that the liability for "taking" of air rights, attached to the airlines or the C.A.A. acting as authorized representative of the United States, and further held "an adequate approach way is as necessary a part of an airport as is the ground on which the airport itself is constructed * * *." Without the "approach area an airport indeed is not operable. Respondent in designing it had to acquire some private property. Our conclusion is that by Constitutional standards it did not acquire enough." In the case at bar it is admitted that Re-

spondent, by Constitutional standards, has not acquired "adequate approach ways", and therefore construction should be enjoined until such time as adequate approach ways are legally acquired.

The decision in the Griggs case repudiated the contention that the Congressional definition of "Navigable Airspace" placed air rights in the public domain, and since the Texas Constitution, Article 1, Section 17 (supra, p. 5), requires payment in advance of "taking" the Petitioners should have been granted the injunction prayed for.

Petitioners also alleged a right to injunction predicated upon the ground that the City in proposing construction, and the State of Texas in passing the Municipal Airports Act, were authorizing the use of public funds and credit for the benefit of private airlines, commercial in nature, all in violation of the provisions of the Texas Constitution. (Art. 3, Section 52; Article 11, Section 3, supra, pp. 5-6.)

These sections of the Constitution were adopted after a disastrous economic period, resulting from municipal grants from Texas cities to induce railroads to locate therein, and have been sustained in numerous instances in Texas. A most lucid interpretation of their significance is set out in *City of Cleburne v. Gulf C. & S. F. Ry. Co., 66 Tex. 457, 1 S. W. 342.* In that case the City of Cleburne contested the railroad's right to collect on warrants issued for the purchase of a right of way, donated by the City to the railroad; the Supreme Court of Texas held that, since under the cited pro-

visions the City was prohibited from donating a right of way to the railroad, the scrip issued in payment therefor was invalid. Petitioners contend that since these Constitutional provisions have been applied to prevent aid to a railroad in the nature of gift of a right of way, they cannot be waived by the Courts to permit construction of a runway for commercial airlines. The power to amend the Constitution is reserved to the people; it has not been granted to the courts. The Texas Courts evaded the issue by making a "finding" on a controverted issue of fact, subject to trial by jury, that they "find no donations or loan of the City's credit contemplated in these provisions or in the City's plans of operations."

Petitioners by their pleadings questioned the legality of the proposed issue of revenue bonds for financing construction, because no election to authorize such issue had been held, because such issue was in excess of the legal limitations imposed upon the City's power to contract debt, and because no tax was levied simultaneously with contract of the debt to pay interest and create a sinking fund for retirement of principal. The relevant statutes are set forth above. (Supra 7, 8, 9.) The Texas Courts rejected Petitioners' argument holding that "revenue bonds" do not create a "debt" within the meaning of the cited statutes and constitutional provisions. Such a holding is in direct conflict with the decisions of the Texas Supreme Court in *T. & N.O. RR. Co. v. Galveston County, 141 Tex. 34, 169 S. W. 2d 713; McNeill v. City of Waco, 89 Tex. 83, 33 S. W. 322; City of*

Fort Worth v. Bobbitt, 121 *Tex.* 14, 41 *S. W. 2d 228*. The meaning of "debt" is well stated in the McNeal case as follows:

> "We conclude that the word "debt" as used in the Constitutional provisions above quoted, means any pecuniary obligation imposed by contract, except such as were, at the date of the contract, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the corporation."

Respondent City admits that said bond issue is to be paid out over a period of twenty (20) years, from funds not now in the immediate possession or under the control of the City. If "debt" carries the meaning given it by the Courts then the proposed issue would be illegal void and unconstitutional.

The Statutes cited show that an election (supra 7, 8, 9) is required to authorize the issuance of revenue bonds for airport improvement. It is conceded that no election was held and that no tax was levied, as required, for payment of interest and a minimum of 2% on principal a year. The construction of Article 11, Section 7 of the Texas Constitution is clearly set forth in *T. & N.O. RR. Co. v. Galveston County*, supra, thus:

> "Debt, with a provision at the time it is incurred to pay interest and at least 2% of the principal each year, is the only alternative. If this provision is not made, the debt is a nullity. This is the requirement of Article 11, Section 7, supra. Its language is unequivocal. It voices the public policy demand so clearly that no arm or agency of the government should attempt to deny it."

The Texas Courts, to nullify the requirement of an election, cited cases holding that a taxpayer was without legal capacity to enjoin a bond issue, since he would sustain no damage until payment was made. Among the cases cited was *City of Corpus Christi v. Flato, 83 S. W. 2d 433.* Suffice it to say that the validity of the bond issue questioned in that case was later denied, *for want of an election*, in City of Corpus Christi v. Hayward, 111 Fed. 2nd 637, and in *Hayward v. City of Corpus Christi, 195 S. W. 2nd 995, R. N.R.E.* Only the bond holders lost in that case.

The instant case is distinguishable from the Flato case and the others relied upon by the Court of Civil Appeals, in that here the Petitioners will sustain immediate injury as the result of an illegal bond issue.

The Texas Municipal Airports Act, Article 46d-9, (supra p. 8) requires an election to authorize issuance of revenue bonds for airport improvement; it has never been repealed: Article 701 and 702 V.T.C.S. (supra, 8) requires an election to authorize issue of bonds as does Article 1269h, V T.C.S. (supra p. 9) and Section 291 of the Charter of the City of Dallas (supra p. 9) contains the same stipulation. Ignoring and refusing to give effect to these statutory requirements, the Texas Courts attempt to justify an issue of bonds without election upon the authority of a single sentence in a statute which obviously establishes administrative procedure for issuance of bonds *after* proper authorization is obtained through election. To avoid the legal effect of the Dallas Charter provision the Texas Courts merely make

a judicial amendment of the statute to redefine the term "bonds".

The issue raised by Petitioners relative to the requirement of Texas Statutes that airport construction conform to Federal Standards, was disposed of by the Court of Civil Appeals by judicial amendment of those statutes (App. A, p. 8) to add the phrase "when Federal funds are used." All of which actions constitute a denial to Petitioners of due process, equal privileges and immunities, and equal protection of the law.

Finally, the Texas Courts have approved in the instant case, "trial by affidavit"; in violation of the Constitutional provision as to right to jury trial and the Rules of law governing summary judgment; in this connection it must be remembered that the Respondent's Motions for Summary Judgment were unverified, that both the Amended Petition and the Respondent's Answer thereto were verified, and that Petitioners submitted to the Court an answering affidavit and supplemental Petition specifying the issues of fact raised by the pleadings which were determinable by jury: among these were the issue of "taking" or "damage"; whether the runway was being built for the benefit of the airlines; whether the runway was a needed public improvement; whether the proposed issue of bonds was in excess of the city's legal limit of indebtedness; whether the runway would constitute a public nuisance; whether Petitioners would sustain irreparable damage; and whether the action by the City was arbitrary and capricious. The right to trial by jury of these issues was illegally and unconstitutionally denied.

Petitioners submit that the decisions in this case indicate that they were arrived at, not upon the foundation of legal jurisprudence, but rather through the determination of politically sensitive courts to lend aid to the Respondent in extricating itself from an untenable position. The action of the Texas Courts, in the premises, was unconstitutional, illegal and void, and constitutes a denial to Petitioners of equal privileges and immunities, due process of law and equal protection of the law; the Petitioners submit that construction of a runway which will result in flying jet aircraft over two elementary schools at an altitude of some 300′ at a distance of 4500′ from the end of the runway is definitely not in the public interest.

CONCLUSION

Wherefore, Petitioners pray that this Court issue a Writ of Certiorari to the Supreme Court of Texas, and that after review and hearing, the Judgments of the Supreme Court of Texas, the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas and the 44th Judicial District Court of Dallas County, Texas be reversed and an injunction against construction and use of said runway be granted to Petitioners against Respondent until such time as Respondent shall have satisfied all legal requirements with reference to said construction and use of the proposed runway, and the issuance of bonds to finance construction; in the alternative Petitioners pray that upon final review and hearing of this cause, that the Judgments of the aforesaid Texas Courts be

reversed, and the cause remanded for further proceedings in accordance with the mandate of this Court.

Respectfully submitted,

JAMES P. DONOVAN,
3015 Highland Park Shopping Village,
Dallas 5, Texas,
Attorney for Petitioners.

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In the

SUPREME COURT OF TEXAS

No. A-8868

GEORGE S. ATKINSON *et al.*,

v.

CITY OF DALLAS

From Dallas County, Fifth District.
March 14, 1962

Application of petitioners for writ of error to the Court of Civil Appeals for the Fifth Supreme Judicial District, as well as motion of respondent to advance consideration of said application, having been duly considered by the Court, it is ordered that the motion to advance be, and hereby is, granted; and the Court having determined that the application for writ of error presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that, in accordance with respondent's motion and under authority of Rule 515, Texas Rules of Civil Procedure, petitioners be, and hereby are, denied the right to file motion for rehearing of application for writ of error herein.

It is further ordered that petitioners, George S. Atkinson et al., and the surety upon their appeal bond, Lawyers Surety Corporation, pay all costs incurred herein.

A-2

No. 16,038

GEORGE S. ATKINSON *et al.*, *Appellants,*

v.

CITY OF DALLAS, *Appellee.*

From a District Court of Dallas County, Texas.

This is an appeal from a summary judgment.

On April 3, 1961 appellant George S. Atkinson and 35 other persons, with the later addition of 10 more persons, filed a class suit against the City of Dallas, Texas, seeking to enjoin the City from constructing a new parallel runway at Love Field Municipal Airport.

Appellants' petition asked for an ex parte temporary injunction, which was denied after a hearing which lasted three days. At this hearing testimony was heard from eight witnesses, which testimony occupies 578 pages in a statement of facts in addition to 47 exhibits.

Some time thereafter the City of Dallas filed its motion for summary judgment and appellants filed their answer to appellee's motion. On July 17, 1961 appellee's motion for summary judgment was sustained. Appellants were denied a permanent injunction.

The record before the trial court when appellee's motion was sustained consisted of the pleadings and the evidence and

exhibits which had been introduced at the hearing on appellants' application for temporary injunction. The transcribed testimony and the exhibits were made a part of the City's motion for summary judgment and are part of the record before us on this appeal.

In their first and seventh points on appeal appellants assert that the trial court erred in holding as a matter of law that the proposed construction of the runway is not a threatened taking of appellants' property rights without compensation in violation of the provisions of the Constitution of the United States and of Texas and of the Texas Statutes. More particularly appellants claim that the City is threatening to seize and take the air rights over appellants' property through the construction and use of the nearby runway without compensation and without condemnation or purchase; and that they will suffer irreparable damage with no adequate remedy at law.

Appellants say that the proposed construction and use of the runway violates the 14th Amendment to the Constitution of the United States, Art. 1, §§ 17 and 19 of the Constitution of the State of Texas, and the following State Statutes: Arts. 46d-2, 46e-13, 3268, and 3269 V.A.T.S.

Art. 46d-2 V.A.C.S. of the Municipal Airports Act, enacted in 1947, authorizes municipalities to establish, acquire and maintain airports. The Act took the place of certain prior existing statutes. Art. 46d-15 of the Act expressly declares that the exercise of the powers so granted shall be considered public and governmental functions. In City of Corsicana v.

Wren, 159 Tex. 202, 317 SW 2d 516 the Supreme Court of Texas held that the said declaration in the statute was not violative of Arts. 1, §§ 13 and 19 of the Constitution of the State of Texas, or the 14th Amendment of the Constitution of the United States. The Court further held that the City of Corsicana was immune from liability for the negligence of its employee in the operation of its airport.

Appellants allege that if the runway is constructed airplanes will fly over their property, causing noises, vibrations and disturbances which will expose appellants to permanent mental and physical injury, and do irreparable damage to their property due to increased insurance rates, reduced rental values, etc. This, according to appellants, constitutes a taking of their property without compensation and without exercising the power of eminent domain.

The position taken by appellants is that Art. 46e-13 V.A.C.S. makes it the duty of the City to condemn airspace which cannot be provided for by the Airport Zoning Statute, Art. 46e-3, V.A.C.S. We think these statutes deal only with landing and take-off hazards and the elimination of present and future obstructions to the approach and departure of aircraft. There is no proof that approach hazards to aircraft exist now or are likely to exist on the properties of appellants, consequently Art. 46e-13 is not applicable.

We cannot agree with appellants that the facts alleged by them constitute a taking of their property as contemplated by Art. 1, § 17 of the Constitution of the State of Texas and the State Eminent Domain in Statute. The proposed runway

will be wholly within the boundaries of Love Field Airport and wholly on land owned by the City. There is evidence in the record that appellants' properties lie 2200 feet or more from the runway. None of appellants own any part of the ground on which the runway will be located. It is not claimed that the City will take over appellants' property by actual physical possession.

There is a difference between a taking of property and a damaging of property. The difference is discussed in McCammon & Lang Lbr. Co. v. T & B V Ry. Co., 104 Tex. 8, 133 SW 247. In that case, speaking of the meaning of "taking" the Court said:

> "Whether the compensation is first to be made must, of course, depend upon the answer to the question whether or not there is to be a taking. Whatever may be the full meaning of the words 'property' and 'taking', in the Constitution, there is no escape from the conclusion that the first includes the fee-simple title to the thing owned, whether it be burdenend with an easement or not, and that the latter includes the appropriation of that thing, or of some interest or estate in it, by actual physical possession, such as exists when a railroad is constructed and operated upon it. G.C. & S.F. Ry. Co. v. Lyons, 2 Willson, Civ. Cas. Ct. App. § 139, and authorities cited."

In this case the City does not propose to take actual physical possession of any of appellants' properties.

We do not hold in this opinion that appellants have a cause of action for damages, for that question is not before us. However, we do hold that if appellants have a cause of action at all, it is for damages to their property, not for a taking

of their property within the meaning of the Constitution and Eminent Domain Statutes. City of Dallas v. Megginson, 222 SW 2d 349; Williams v. City of Dallas, 52 SW 2d 373; Duvall v. City of Dallas, 27 SW 2d 1105; City of Abilene v. McMahan, 292 SW 525; Baugh v. T & N O R R Co., 80 Tex. 56, 15 SW 587. Appellants' first and seventh points are overruled.

In their second point appellants allege error in the court's holding as a matter of law that the construction of the proposed runway would not constitute a nuisance.

It is undisputed that the proposed runway is a permanent improvement constructed by a municipality for a public use pursuant to legislative authority. Therefore, it is not legally a nuisance. Williams v. City of Dallas, 52 SW 2d 373 (Syl. 4); City of Abilene v. McMahan, 292 SW 525, 528; Aycock v. San Antonio Brewing Association, 63 SW 953, 955. Moreover, even if we were to say that the proposed runway could legally be a nuisance, appellants' cause of action, if any, would be for damages, not for injunction. City of Dallas v. Winans, 262 SW 2d 256; Baugh v. T & N O R R Co., 80 Tex. 56, 15 SW 2d 587. Appellants' second point is overruled.

Appellants in their third point charge that the court erred in holding as a matter of law that the proposed runway if constructed would not be in violation of the Municipal Airports Act requiring construction to be consistent with Acts of Congress and all regulations or standards established pursuant thereto. Specifically, appellants claim that the con-

struction of the runway would be violative of Arts. 46d-2(d) and 46d-7(b) V.A.C.S.

The point is not well taken. Art. 1350, Title 49, U.S.C.A. provides that if no Federal funds are applied for the only approval required of the Administrator of the Federal Aviation Agency is as to the "use of airspace by aircraft." The Federal Government is not contributing any funds to the construction of the proposed runway. The City of Dallas, through the sale of revenue bonds, will furnish all the funds necessary for the construction of the runway. The record shows that the City already has the approval of the Administrator as to the "use of airspace by aircraft."

Furthermore, we think that if any complaint on this score is to be made, it should be made by the Federal Aviation Agency, not by appellants. The Federal Aviation Agency, not the City of Dallas, operates the airport's control tower and will determine who may use the runway. It is up to the Agency to apply its regulations. City of Newark v. Eastern Airlines, 159 Fed. Supp. 750. In the case now before us neither the Airlines who will use the runway, nor the Federal Government are parties to the action, though it is held in Bourland v. City of San Antonio, 347 SW 2d 660 that they are indispensable parties. Appellants' third point is overruled.

Appellants' fourth and sixth points allege error on the court's part in holding as a matter of law that the proposed runway is a necessary public improvement and that the action of the City is not arbitrary and capricious.

The undisputed evidence in this case shows that Love Field Airport has been in operation by the City since the year 1922 and has been owned by the City since 1928. From time to time as air traffic at the airport has increased the airport and its facilities have been enlarged and expanded to meet the ever growing demands of the public. The construction of the proposed runway will merely be another in a succession of expansions to meet the growing needs. The statutes entrust to the municipal authorities the responsibilities of deciding when a necessity exists to make such public improvements and the courts may not review the decisions of tne proper municipal authorities in that respect unless such decisions are arbitrary and without reason. Under the undisputed circumstances presented in this record there is no support for a finding that the action of the City Authorities is arbitrary or without reason. City of Corsicana v. Wren, 159 Tex. 202, 317 SW 2d 516; Town of Ascarate v. Villalobos, 148 Tex. 254, 223 SW 2d 945; Gillham v. City of Dallas, 207 SW 2d 978; Sitterle v. Victoria Cold Storage Co., 33 SW 2d 546; and West v. Whitehead, 238 SW 976. Appellants' fourth and sixth points are overruled.

In their fifth point appellants say that the court erred in holding as a matter of law that the new runway was not a donation or a loan of credit to private corporations or associations in violation of Art. 3, § 52 of the Constitution of Texas.

Art. 46d-4 V.A.C.S. provides that cities operating airports are given authority to enter into contracts and lease arrangements not to exceed 40 years with airlines and other users

of the airport, and may also fix charges for the use of the airport facilities and operate the airport as a utility. Art. 46d-11 provides that all revenues arising from the operation of the airport shall be appropriated solely to, and used by the municipality for purposes authorized by the Municipal Airports Act.

We find no donations or loan of the City's credit contemplated in these provisions, or in the City's plans of operation. Appellants' fifth point is overruled.

In their eighth and tenth points appellants assert that the court erred in holding that the proposed issue of bonds was legal, and was not violative of statutory and constitutional restrictions as to bond issues and debt limits; and in holding that the City could legally issue revenue bonds to finance construction of the runway without first submitting a proposition for the issuance of the bonds to the qualified voters who are tax payers of the City.

The City proposes to finance the construction of the runway by the issuance of revenue bonds in the amount approximately of $5,000,000. The ad valorem bond limit of the City has been fixed at $135,000,000. The sworn pleadings of the City allege that at the time of the trial there was $117,000,000 of ad valorem tax bonds outstanding. Appellants claim the amount of outstanding tax bonds is greater. We shall not try to reconcile this difference for in our opinion the question is immaterial to our decision in this case.

Revenue bonds are not considered as debts coming within constitutional and statutory restrictions on the amount of

municipal debts. City of Seymour v. Municipal Acceptance Corporation, 96 SW 2d 814; City of Dayton v. Allred, 123 Tex. 60, 68 SW 2d 172; Sowell v. Griffith, 294 SW 521.

We find no provision in the Constitution of Texas requiring the submission to the voters of a City the proposition to issue bonds. The statute which is now known as Art. 701, V.A.C.S. was enacted in 1899. Moller v. City of Galveston, 57 SW 1116. In City of Corpus Christi v. Flato, 83 SW 2d 433, it was held that a city with a population of over 5,000 may issue revenue bonds pursuant to Arts. 1111 and 1112 V.A.C.S. without submitting the proposition to the voters. See also Womack v. City of West University Place, 32 SW 2d 930. In the instant case the City proposes to proceed according to Art. 1269j, V.A.C.S. It has a right to do so. Appellants' points eight and ten are overruled.

Appellants' ninth point is to the effect that the court erred in holding that appellants were estopped to seek an injunction and that appellees was not estopped to build the runway. According to appellants the pleadings of the parties raise fact questions which must be settled before the pleas of estoppel may be determined.

We find nothing in the record to indicate that the trial court made any specific findings or conclusions in regard to estoppel. The court based its judgment on the legal principles which we have heretofore discussed in this opinion, which we believe to be correct conclusions, and fully support the court's judgment. Appellants' ninth point is overruled.

In their eleventh point appellants say that the record presents genuine issues of material fact, therefore the sum-

mary judgment was not proper. In their argument under this point appellants list eleven alleged fact issues. We have carefully considered each of the alleged fact issues. We cannot agree with appellants. The alleged fact issues either present questions of law or present matters which are immaterial in view of applicable legal principles. Appellants' eleventh point is overruled.

In a well prepared brief appellants cite more than one hundred cases which they say support their position in this controversy. We shall undertake to discuss here only a few of these cases.

In United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062, 90 L. Ed. 1206 the Supreme Court of the United States was concerned with Title 49, § 180, U.S.C.A. which authorized the Civil Aeronautics Authority to prescribe minimum safe altitudes of flight, the statute further providing that "navigable airspace" should mean airspace above said minimum. The Authority had prescribed 500 feet as the minimum during the day and 1,000 at night for air carriers. The statute was later repealed. In its stead Title 49, § 1301, par. 24 was enacted and is now in effect. The latter statute expressly provides that " 'Navigable airspace' * * * shall include airspace needed to insure safety in take-off and landing of aircraft. Thus by Act of Congress the minimum of navigable airspace was changed. There is no showing here that the City of Dallas, by constructing the proposed runway, will violate Title 49, §1301, par. 24 U.S.C.A. the statute now in effect. Moreover, the Causby case, supra, involved a claim for damages, no injunctive relief.

Brazos River Conservation & Reclamation District v. Costello, et al., 135 Tex. 307, 143 SW 2d 577 involved an actual physical taking of the property owners' land by flood waters creating what is now know as Possum Kingdom Lake. In the instant case we have no physical taking of appellants' property.

Koslosky v. Texas Electric Service Co., 213 SW 2d 853, 854 involved an undertaking to build a power line under a grant from a County Commissioners Court. The grant was held to be void among other reasons because the County had no authority to make the grant since power and control of City streets is lodged in the City not the County.

Appellants cite several cases in which condemning authorities were enjoined from proceeding with operations which were declared to be void. We do not disagree with such holdings. We simply say that the laws under which the City is proceeding are not void, so the cited cases are not applicable.

We find no material error in the trial court's judgment. The judgment is affirmed.

(Signed) DIXON

DIXON, *Chief Justice.*

Delivered: December 15, 1961

THE STATE OF TEXAS

I, JUSTIN G. BURT, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, hereby certify that the foregoing ten (10) pages constitute a true and correct copy of the Opinion of this Court, delivered and filed in my office on the 15th day of December, 1961, in Cause No. 16,038, George S. Atkinson, et al, appellants v. City of Dallas, appellee, as the original thereof now appears on file in my office.

TO CERTIFY WHICH, Witness my hand the seal of said Court at office, in Dallas, this the 4th day of June, A. D. 1962

JUSTIN G. BURT,
Clerk.

(SEAL)

A-14

COURT OF CIVIL APPEALS

Fifth Supreme Judicial District

JUSTIN G. BURT, *Clerk*

Dallas, Texas, January 19, 1962

Mr. James P. Donovan,
Dallas, Texas.

Sir:

You are hereby notified that; in the case of
George S. Atkinson, et al vs.
City of Dallas

our No. 16,038, from Dallas County, the following decision and order was this day made and entered by this Court:

The court's opinion was corrected and after correction appellant's motion for rehearing was overruled.

The correction of the opinion is as follows:

Seventh line from the top of page one is corrected to read as follows:

"Appellant's petition asked for a temporary" • • •.

The fifth line from bottom of page four is corrected to read as follows:

"It is undisputed that the proposed runway will be a permanent" • • •.

Respectfully yours,

JUSTIN G. BURT, *Clerk*,
Court of Civil Appeals,
Fifth Supreme Judicial
District of Texas.

GEORGE S. ATKINSON, *et al.*

16038 *v.*

CITY OF DALLAS

From District Court of Dallas County
Friday, December 15, 1961

Opinion of the Court delivered by Mr. Dixon, Chief Justice.

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is in the opinion of the court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be, in all things, affirmed; that the appellee, City of Dallas, have and recover of the appellants, George S. Atkinson, et al. and of Lawyers Surety Corporation, their surety upon appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

GEORGE S. ATKINSON, *et al.*

16038 *v.*

CITY OF DALLAS

Friday, January 19, 1962

It is ordered that the Court's opinion heretofore filed in this cause be corrected in the following respects: Line 7 from the top of page 1 is corrected to read as follows: "Appellants' petition ask for a temporary" * * *. Line 5 from the bottom of page 5 is corrected to read as follows: "It is undisputed that the proposed runway will be a permanent" * * *.

GEORGE S. ATKINSON, *et al.*

16038 *v.*

CITY OF DALLAS

Friday, January 19, 1962

This day came on to be heard the motion of appellants for rehearing of this cause, and the same being inspected, it is considered, adjudged and ordered that the motion be overruled.

THE STATE OF TEXAS

I, Justin G. Burt, Clerk of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas, do hereby certify that the foregoing one page contains true and correct copies of the following:

The judgment of this Court.

Order correcting the Court's opinion.

Order overruling Appellants motion for rehearing, as the same appear of record in the minutes of this Court.

Given under my hand and seal of said Court, at office in Dallas, this the 8th day of May, A. D., 1962.

JUSTIN G. BURT,
Clerk.

(SEAL)

B-1

No. 59027-B

In the
44th JUDICIAL DISTRICT COURT
Of Dallas County, Texas

GEORGE S. ATKINSON, *et-al.*,
Plaintiffs,

v.

CITY OF DALLAS, TEXAS,
Defendant.

Filed: June 22, 1961

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

To Said Honorable Court:

Come now Plaintiffs in the above entitled and numbered cause, and pleading jointly and severally in their own behalf, and as representatives of the class consisting of all home owners whose residences are situate within the area comprising the proposed approach and departure paths of a planned instrument runway, identified by the Defendant City of Dallas, in a plan filed with the Federal Aviation Agency under date of November 17, 1960, as Runway 13R 31L, the members of such class being so numerous as

to make it impracticable to bring them all before the Court, respectfully show this Court as follows:

1.

That the Plaintiffs are resident tax payers of the City and County of Dallas, State of Texas, and owners of homes and real property situate at the addresses set opposite their names in the following schedule:

Paul A. Crick—9615 Overlake Drive;
Dr. Hobson Crook—9631 Overlake Drive;
George H. Harmon—9600 Overlake Drive;
James H. Parr—9525 Overlake Drive;
Martin E. Collis, Jr.—9515 Overlake Drive;
J. W. Slaughter—9530 Overlake Drive;
James E. Strum—9706 Overlake Drive;
Floyd R. Raupe—9730 Overlake Drive;
George S. Atkinson—2923 Northwest Highway;
Vernon C. Pampell—3038 Northwest Highway;
Paul H. Crawford—2747 Bachman Drive;
E. T. Busch—2829 Bachman Drive;
V. C. Bilbo—2730 Bachman Drive;
W. H. Richardson—2755 Bachman Drive;
Austin Crow—2807 Bachman Drive;
J. O. Garrett—2801 Clydedale;
E. W. Quinton—2930 Clydedale Drive;
Dr. Grant Boland—2831 Clydedale;
L. E. Dease—2833 Kendale Drive;
H. P. McDonald—3001 Kendale Drive;
M. J. Pellillo—2830 Kendale Drive;
J. D. Lowrie—3018 Kendale Drive;
S. R. Kirby—2803 Kendale Drive;
Charles Williamson—3061 Cridelle Drive;
Jean Shaw—3045 Cridelle Drive;
W. Claude Jones—9715 Starlight;
James W. Odom—2624 Community Drive;
Reveau & Virginia Bassett—3155 Timber Lane;
Walter Sodeman—3320 Inwood Road;

Mr. & Mrs. O. L. Whitman—3324 Inwood Road;
Mr. & Mrs. J. Walter Long, Jr.—3312 Inwood Road;
Mrs. Charles J. Butler—3307 Cherrywood;
C. H. Asel—3018 Inwood Road;

together with the following named persons joined herein as Plaintiffs with leave of Court:

Lee R. Slaughter—9507 Overlake Drive;
Frank Grimes—3050 Community Drive;
Winston C. Jones—2939 Clydedale;
C. O. Crudgington—3033 Cridelle Drive;
Daniel C. Brown—3064 Cridelle Drive;
J. W. Tomlin—3050 Norwalk;
William Darrell Graves—2742 Bachman Blvd.;
George B. Lotridge—5422 Bradford Drive;
Lloyd S. Carter—2700 West Northwest Highway;
Arthur E. Tappan—2928 Northwest Highway.

2.

That included in the class which Plaintiffs represent are the home owners, families and individuals who live, work, reside and attend schools, churches and other community centers in the area embraced within the approach areas of planned runway 13R 31L; that the persons constituting this class number in the thousands making it impracticable to bring them all before the Court; that the named Plaintiffs and the class they represent have several rights, affected by a common question of law and fact, and a common relief is sought.

3.

That the Defendant, City of Dallas, is a municipal corporation, duly chartered under the laws of the State of Texas, and the owner and operator of an airport designated

as "Love Field" located wholly within the limits of the City of Dallas, Dallas County, Texas.

4.

That Love Field, as it presently exists, has two runways used for the landing and take off of aircraft of various types including jet propelled planes; the one runway generally used for jet aircraft runs northwest and southeast, while the second shorter runway runs generally north and south.

5.

That in March of 1960, the application of the Defendant City of Dallas for Federal aid in the construction of a new runway designated 13R 31L, 8000 feet in length, 3,000 feet to the southwest of and parallel to the existing Northwest Southeast runway was rejected by the Federal Aviation Agency as not conforming to Federal Standards for, among other reasons, lack of adequate clear zones as specified by Federal Standards; the proposed 8,000 feet runway was inadequate to meet indicated ultimate needs; and the proposed approach and departure paths of said planned runway would pass directly over a thickly populated residental area including numerous schools, churches, hospitals and other places of public assembly.

6.

That thereafter the Defendant City of Dallas gave notice to the Federal Aviation Agency of its intention to construct runway 13R 31L without the use of Federal Funds, as an

instrument runway with a length of 8,000 feet; and March 24, 1961 obtained a Federal Aviation Agency clearance from the standpoint of airspace utilization but not from the standpoint of compliance with Federal Standards as to construction of the proposed runway.

7.

That the Defendant City of Dallas proposes to build and use the new runway for the purpose of providing additional facilities at Love Field for the landing and take off of all types of aircraft including jets, which use will necessarily result in the seizure and taking of Plaintiffs' air rights over and above their respective properties for an alleged public use.

8.

That the Defendant City of Dallas has made no provision for the acquisition of Plaintiffs' air rights either by purchase or condemnation and proposes to take and seize such rights for an alleged public use without compensating Plaintiffs therefor, all in violation of the provisions of the Constitution of the United States of America, Amendments V and XIV, the Constitution of the State of Texas, Article 1, Section 17 and Articles 3264 through Article 3271 of the Texas Revised Statutes of 1925 as amended.

9.

That the Defendant City of Dallas proposes to install and use the proposed runway under the authority vested in it as a municipality by the Texas Municipal Airports Act, Article 46D et seq., Texas Revised Statutes as Amended.

10.

That the Texas Municipal Airports Act, Article 46d—2(d) provides *ad* follows: "Limitation on Design and Operation of Air Navigation Facilities. All air navigation facilities established or operated by municipalities shall be supplementary to and co-ordinated in design and operation with those established and operated by the Federal and State Governments."; that article 46d—7(B) of said Texas Municipal Airports act provides: "Conformity to Federal and State Law. No ordinance, resolution, rule, regulation or order adopted by a municipality pursuant to this Act, shall be inconsistent with, or contrary to, any Act of the Congress of the United States or laws of this State, or to any regulations promulgated or standards established thereto."; and that the new runway proposed to be built and used by the Defendant City of Dallas is an air navigation facility within the definition of said Texas Municipal Airport Act.

11.

That the action of the Defendant City of Dallas in constructing the proposed runway is ultra vires, void, illegal, and contrary to law in that the proposed runway fails to comply with established regulations and standards established, pursuant to Act of Congress, and is not coordinated in design and operation with airports established and operated by the Federal Government in the following respects:

1. The proposed runway is not coordinated in design with the technical standards and design criteria established in

the Federal Aviation Agency Planning Series No. 3 published September 2, 1960 in that the most critical areas, those in the runway approach and departure paths, are presently thickly populated residential areas, occupied by schools, churches, hospitals and numerous places of public assembly.

2. The plan for the proposed runway submitted to the Federal Aviation Agency on the basis of the Master Plan approved in 1948, to obtain air space clearance, failed to include a showing of runway clear zones as required by Federal Aviation Agency Regulations Part 550. 38 effective November 18, 1960.

3. The proposed runway plan wholly fails to provide clear zones at each end of said runway as required by Federal Aviation Agency Regulation 550 Subchapter D, effective November 18, 1960.

4. The proposed runway plan fails to comply with the Standards established by Technical Standard Order TSO—N6b as issued by the Administrator of Civil Aeronautics, accepted and approved by the Federal Aviation Agency.

5. The proposed runway if constructed will not comply with the standards of the Federal Aviation Agency as published in Technical Standard Order TSO—N18 as amended entitled "Criteria For Determining Obstructions to Air Navigation" in that there presently exists objects which project above the landing area and all referenced imaginary surfaces described in Section "A" of said Technical Standard Order which constitute oostructions to navigation as defined therein; and said runway further fails to comply with said Technical Standard Order, Section "B" in that there are

numerous obstructions to navigation existing in the instrument approach zone which constitute airport hazards and public nuisances within the definitions of Airport Zoning Regulations as set forth in Airport Zoning Regulations, Article 46e—1 and Art. 46e—2 of the Revised Statutes of Texas.

6. The proposed runway fails to comply with Federal Aviation Agency Airport Engineering Data Sheet, Item No. 24 issued August 17, 1959 on the Subject: "Airport Design Recommendations" in that it does not provide the necessary clearances recommended therein.

7. The proposed runway fails to meet Federal Standards of construction, design and operation in that the layout of said runway in relation to the existing runway will not permit both to be used to expedite instrument weather traffic.

8. The proposed runway fails to comply with the Standards established by the Technical Standard Order TSO—N14 issued May 24, 1949 by the Administrator of Civil Aeronautics and adopted by the Federal Aviation Agency as its Technical Standard Order on the subject of Airport Traffic and Taxi Patterns.

9. The proposed runway fails to comply with the requirements of Technical Standard Order TSO—N24 issued by the administrator of Civil Aeronautics and adopted as part of its Regulations by the Federal Aviation Agency on the subject of approach lighting.

10. The proposed runway fails to comply with or make provision for meeting the requirements of Federal Aviation Agency Standards as set forth in Technical Standard Order TSO—N25 as to Obstruction Lighting Basic Requirements.

11. The proposed instrument runway fails to meet Federal Standards in that it would require a glide angle in excess of the established angle of 2.84 , established by the Federal Aviation Agency as the maximum of glide angle safety, because of obstructions to navigation within four miles of the end of the runway.

12. The electronic interference from buildings, railroad tracks and other obstructions existing in violation of recommended clearances would prevent compliance with established Standards and designs for instrument landing systems, resulting in glide path and localizer roughness in the vicinity of an area approximately 5 miles from the Southeast end of the proposed runway.

That the foregoing failures of the Defendant to comply with the Standards of airport construction and to coordinate the proposed navigational facilities in design and operation will necessarily cause Plaintiffs irreparable damage when said facilities are placed in operation by the Defendant.

12.

That the construction and operation of the runway proposed to be built by the Defendant have resulted in and will

necessarily result in creation of the following conditions effecting lives and property of the Plaintiffs:

1. by joint action of the Federal Aviation Agency and the Federal Housing Administration insurance of mortgages by the latter will be refused or substantially reduced as to Plaintiff's properties lying within 25,000 feet of either end of the proposed runway, said action being confirmed by the Federal Housing Administration by Letter to Director of All Field Offices No. F-177, dated May 3, 1961;

2. the sale and rental value of Plaintiffs properties will be dissipated by existing and potential hazards of low flying aircraft and the nuisance of noise substantially increased by the ever developing use of jet aircraft;

3. Plaintiffs' right to the quiet enjoyment of their homes, schools, and churches will be permanently and effectively destroyed;

4. the excessive noise generated by jet aircraft upon take-off and landing will cause Plaintiffs both physical and mental distress and will expose Plaintiffs to an unusual and extreme danger of permanent mental and physical injury;

5. the properties of Plaintiffs will be exposed to abnormal hazards of damage due to severe vibrations and expulsion of waste resulting from the landing and take off of jet aircraft in the immediate vicinity of their homes;

6. the operation of jet aircraft from the proposed runway will result in exposing Plaintiffs and their families to abnormal and unusual hazards of life and limb in their homes,

schools, churches and other community centers, and will place their lives and health in continuous jeopardy;

7. the operation of jet aircraft over and above the public and private schools situate in the approach area will seriously hamper programs of instruction, interfere with public education and place the lives and physical well being of students and teachers in constant peril;

All of which conditions will result in irreparable damage to these Plaintiffs as a necessary consequence of operations to be conducted from the proposed runway.

13.

That the establishment of the proposed runway and the operations planned to be conducted therefrom will create a public nuisance, necessarily causing and resulting in the situation and conditions hereinafter described:

1. Plaintiffs will be exposed to an abnormal risk of death and serious injury by reason of the operation of jet and large propeller aircraft over and in the vicinity of their homes, schools, hospitals and churches in disregard of the minimum standards of safety in such case made and provided;

2. Plaintiffs will be subjected to physical suffering and mental distress by the excessive noise generated by jet planes landing on and taking off from the runway, constructed in violation of Federal Standards of construction;

3. Plaintiffs' health will be seriously impaired by reason of the excessive noise generated by landing and departing planes;

4. Plaintiffs will be denied the right of quiet enjoyment of life and property in a normal manner by reason of the operation of jets and other powerful aircraft over their residential area and community schools and churches;

5. the value of plaintiffs homes for residential purposes will be seriously depreciated or wholly dissipated by reason of the air traffic generated by the construction and operation of the proposed runway;

6. the ability of Plaintiffs and their successors in title to obtain reasonable financing incident to improvement or sale of their properties will be either seriously impaired or wholly negatived;

7. the rental value of Plaintiffs properties will be seriously reduced or altogether extinguished.

8. the properties of Plaintiffs and schools and churches in the approach area will be subject to continuing damage by excessive vibration resulting from the air traffic generated and the expulsion of jet waste causing discoloration of buildings, and offensive odors;

9. an established existing residential area will be subjected to a use of commercial or industrial nature in violation of existing zoning laws of the City of Dallas and deed restrictions of record in the Dallas County Clerk's office;

10. Plaintiffs will be subjected to excessive risk of death and injury and property damage resulting from failure of light aircraft to successfully take off from or land on the proposed runway;

11. Persons employed in industrial plants situate within 2500 feet of the ends of the proposed runway will be placed in great jeopardy of life and health from low flying aircraft including those which are jet propelled;

12. the orderly process of instruction and education will be seriously impaired and interfered with by the operations proposed, and the life and health of thousands of children attending schools in the area will be placed in serious jeopardy;

13. an already congested traffic situation on highways in the vicinity of Love Field will be made more dangerous through the distraction resulting from low flying aircraft, and the general safety of persons moving in vehicular traffic greatly imperiled;

Which situation and conditions as detailed above the necessary consequences of the construction and operation of the proposed runway, however skillful said operations may be.

14.

That the runway proposed to be built by the City is not a public necessity or convenience nor will the public interest be served thereby for the following reasons:

1. the present facilities of Love Field are capable of handling operations involving the arrival and departure of aircraft at the rate of 50 to 60 movements per hour and in the past have handled up to 90 movements per hour;

2. the number of scheduled movements per day of air carriers of freight and passengers averages approximately 360 at Love Field;

3. the proposed runway will not expedite air traffic because it can not be used simultaneously with the existing runway for movement of aircraft;

4. Less than 36% of the aircraft movements at Love Field are instrument operations;

5. Only approximately 56% of present movements at Love Field involve public aircraft carriers of freight and passengers flying on schedule; 1% involves airforce and naval aircraft and 43% of all movements is accounted for by private aircraft which could be accommodated at other Dallas County Airports;

6. the present policy of the Federal Aviation Agency is to reduce the number of flights to separate air carrier airports in cities sufficiently close to be served by one airport and an application is already on file with the Civil Aeronautics Board requesting that service between Dallas and Fort Worth and New York Newark and Washington be provided through either Love Field or Amon Carter Field to the exclusion of one or the other;

7. a municipal airport of like service classification to Love Field and with facilities in excess of public demand therefor is located within twelve miles of Love Field and is strategically located to service the City of Dallas in air commerce;

8. that the simultaneous use of parallel runways in the manner proposed by the Defendant which has not been approved by the Federal Aviation Agency will increase the danger of mid-air plane collision in case of abortive landing

by an incoming aircraft, to the detriment of the air passengers, and persons and property within the established approach area.

15.

That the action of the Defendant City of Dallas in proposing to build and put the new runway into operation is arbitrary and capricious and contrary to the public interest for the following reasons:

1. that said Defendant does not have in its permanent employment a qualified engineer competent to determine the desirability or practicability of maintaining Love Field as a major air field within the geographical limits of the City of Dallas;

2. that in a report of City Planner Harland Bartholomew presented to the Council of the City of Dallas under date of September 1943 Mr. Bartholomew stated: "Love Field is surrounded by commercial, industrial, and residential developments, and the cost of any extension would be very high if not prohibitive * * * This failure to provide enough land area has been the most serious mistake in nearly every city where major airports have been developed * * * The site must not interfere with existing and probable future urban areas. If air transportation develops as expected, it will be necessary to adopt rigid rules regarding the operation of airplanes over developed urban areas because of the noise, confusion and possibility of accidents. For this reason airports, particularly the major airports, should be located outside the future urban area in order

to minimize the adverse effects on possible developments * * * Love Field is now located in a fully urbanized area, and the anticipated aeronautical use of this field would be very detrimental to proper development of this section of the City. It is also possible that operations at Love Field could be limited and coordinated with the new site. Under this arrangement Love Field could be maintained as a manufacturing and service field with strictly limited regulations regarding landings and takeoffs."

3. In a deed from the United States Government to the Defendant City of Dallas of a portion of the land comprising the present Love Field, under the Surplus Property Act of 1944 the United States incorporated a restriction running with the land imposing an obligation on the grantee to clear and protect the aerial approaches to the airport and to prevent the establishment or creation of future airport hazards, said deed having been given to the Defendant City in 1946;

4. The City of Dallas agreed in connection with the acceptance of Federal Aid for Airport Development to clear and protect the aerial approaches to the airport and to prevent the establishment or creation of future airport hazards, and the Defendant City in connection with one of its Federal grants was specifically advised that the final payment of 10%, under the Federal grant would not be made unless the approach area "have been protected by the adoption of a zoning ordinance or regulations or by securing navigation easements or otherwise prohibiting the creation, establishment, erection or construction in such

areas of airport hazards to the extent provided" in CAA recommended Standards or to such reduced Standards as might be approved by the CAA.

5. That the information set forth in the preceding two paragraphs was called to the attention of the Council of the City of Dallas in the report filed by James C. Buckley, Inc., Terminal and Transportation Consultants under date of March 24, 1952.

6. That in 1948 the City of Dallas approved a Master Plan for Love Field which included parallel Northwest Southeast runways of a length of 6,250 feet, which plan continued in effect until 1954 when the City altered said plan to provide for the extension of these runways to a maximum length of 8,500 feet.

7. That since the City of Dallas has had authority to exercise zoning powers over the lands owned and occupied by Plaintiffs said lands have been zoned residential and as of this date carry that classification.

8. That the City of Dallas through its building inspector issued permits to the Plaintiffs and their predecessors in title specifically authorizing construction of their existing residences.

9. That the Defendant City of Dallas, never passed an Airport Zoning Ordinance until January of 1955.

10. That since January 1959 the Defendant City of Dallas has permitted jet aircraft to land and takeoff from Love Field in violation of the express prohibitions of the

Dallas City Code Sections 30-1 and 30-2 which expressly prohibit noises detrimental to life or health and noises interfering with enjoyment of property or public peace and comfort;

That the construction and operations of the proposed runway will necessarily cause and result in further violations of the cited code provisions;

11. That the City Council has repeatedly in the past and continues in the present to ignore the recommendations of its Terminal and Transportation Consultants, and the Federal Aviation Agency that further development of Love Field and other airports in the vicinity be made under a regional airport plan in the public interest.

12. That the City of Dallas has only a defeasible title to Love Field Airport.

That the City of Dallas has not effectively enforced its Airport Zoning Ordinance.

16.

That the Defendant City of Dallas has approved the letting of a contract for the construction of the planned runway and called for bids on a proposed issue of revenue bonds which action is unconstitutional, illegal, and void for the following reasons:

1. The Constitution of the State of Texas limits the purposes for which municipal bonds may be issued, denies the legislature power to authorize any city to lend its credit or grant public money or thing of value in aid of any indi-

vidual, association and corporation, and requires that bonds may be issued only upon a vote of a two-thirds majority of the resident qualified taxpayers, all as provided in Article 3, Section 52 of said Constitution;

2. That Article 701 of the Revised Civil Statutes of Texas provides that the bonds of a county or an incorporated city shall never be issued for any purpose unless a proposition for the issuance of such bonds shall have first been submitted to the qualified voters who are property taxpayers of such county, city or town;

3. Article 11, Section 7, of the Constitution of the State of Texas provides that no debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two per cent (2%) as a sinking fund; and the condemnation of the right of way for such works shall be fully provided for;

4. That Article 46d-9 of the Revised Statutes of Texas, a portion of the Texas Municipal Airports Act, provides in part as to financing airport improvements that "For such purposes a municipality may issue general or special obligation bonds, revenue bonds or other forms of bonds, secured or unsecured, including refunding bonds, and levy taxes to provide for the interest and sinking funds of any bonds so issued, the authority hereby given for the issuance of such bonds and levy and collection of such taxes to be exercised in accordance with the provisions of Title 22 of

the Revised Civil Statutes of Texas, Article 701 et seq., and Acts amendatory thereof or supplementary thereto."

5. The Charter of the City of Dallas, Section 288 provides that the total bonded indebtedness of the City shall never exceed the sum of one hundred thirty-five million ($135,000,000.00) Dollars, and that any issue in excess of said sum shall be void as to such excess.

6. The Charter of the City of Dallas, Section 289 provides in part: "Any proposition to issue new or additional bonds, as authorized herein, as well as the amounts of such issuance and the purpose of the same, shall be first submitted to a vote of the qualified voters of the City of Dallas who are property taxpayers of the City, at an election for that purpose."

7. That the bonded indebtedness of the City of Dallas is presently in excess of $160,000,000.

8. That no election has been held in the City of Dallas relative to the proposed improvement of Love Field through the construction of the new parallel runway, nor has the proposition for the issuance of revenue bonds for the purpose of paying for such improvement ever been submitted to the vote of the qualified taxpayers of the City of Dallas.

9. That the revenues from Love Field both present and future are inadequate to defray current expenses and amortize the indebtedness of the City resulting from the purchase and development of said Field.

10. That all State Statutes purporting to authorize the issuance of revenue bonds without approval by a vote of the people are unconstitutional and void.

11. That all State Statutes, and particularly Article 1269-J-5 of the Revised Civil Statutes of Texas which purport to avoid constitutional limitations by attempting to redefine the meaning of the word "debt" as used in the Constitution of the State of Texas, are unconstitutional and void.

Wherefore, Plaintiffs pray that the Defendant City of Dallas be permanently enjoined from construction of a Northwest Southeast runway parallel to the existing runway at Love Field, Dallas, Texas; that the Defendant City of Dallas be permanently enjoined from issuing any municipal bonds except those which are authorized by the Constitution of the State of Texas; that the Defendant City of Dallas be permanently enjoined from lending its credit and or granting public funds or other things of value in aid of individuals, associations, or corporations; that the issuance of any bonds until the proposition relative to such issuance has been approved by a vote of the qualified taxpayers of said City; that the Defendant City of Dallas be permanently enjoined from submitting a proposal for the issuance of new or additional bonds to a taxpayers' election when such proposal would increase the City's total of bonded indebtedness to an amount in excess of $135,000,000; and that Plaintiffs recover their costs of suit and have such other and further relief as they may be entitled to in the premises.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1961

GEORGE S. ATKINSON ET AL.,

Petitioners,

CITY OF DALLAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Jurisdiction

No substantial federal question is presented in this case, and therefore no jurisdiction exists to review the decision of the Supreme Court of Texas. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288; *Arizona v. California*, 283 U.S. 423. *Griggs v. County of Allegheny*, 369 U.S. 84, involved damages rather than an injunction as does the instant case and therefore *Griggs* is not in conflict with the decision of the Supreme Court of Texas review of which is sought herein.

Question Presented

Whether an injunction will be granted to restrain a public improvement authorized by statute where an adequate

remedy for damages is specifically provided by the State Constitution?

Statement of the Case

Petitioners seek to enjoin the City of Dallas from awarding a contract to construct a runway parallel to an existing runway at Love Field, the airport serving the City of Dallas. This airport was constructed by the army in 1917 (R. 274) and has been owned and operated by the City since 1928. When the airport was acquired the surrounding area was uninhabited open country.

All of Petitioners have purchased their property near the airport since 1947, some of them as late as 1956 (R. 462). Some of Petitioners' own property which is located more than 2200 feet from the north end of the proposed parallel runway and others own property which is located more than 3000 feet from the south end of that runway. Although a three-day evidentiary hearing was held, no evidence was offered that airplanes using the proposed parallel runway would fly over Petitioners' property at any particular height. Jet aircraft use about 4500 to 5000 feet of runway in taking off (R. 272, 517) and these planes rise about 1000 to 2000 feet in 4000 feet of flight (R. 291). When landing they touch down on the runway about 750 feet from the approach end (R. 235) and can stop in about 3500 feet (R. 477). One of Petitioners who was their major witness testified that while the existing runway generated much air traffic (R. 463) this runway is considered safe (R. 465).

The existing runway is 7800 feet in length and the proposed parallel runway will be 8800 feet in length.

The City will pay the entire cost of this project. No federal funds are involved. The City bonds to finance this runway cannot be issued so long as this litigation is pending.

It is imperative that construction of this runway begin at the earliest possible moment. Due to jet aircraft the proposed runway is crucial to safe operation of the airport (R. 140, 267-268, 270, 320-321, 571). The airport has been designated as a "survival airport" in case of national emergency. It is vital that this summer of 1962 be utilized for construction as winter weather delays may accelerate the dangers caused by operation of the airport without the proposed runway. The ever changing and increasing cost picture may cause the low bidder on the contract to withdraw his bid unless work can begin now on this project.

Fourteen Texas judges have unanimously rejected all of Petitioners' contentions.

This is a nuisance lawsuit. Petitioners have not only lost unanimously in the three state courts before whom this case has come but they deliberately have delayed perfecting appeals until the last moment all along their route to this Court so as to cause maximum injury to the public interest which supports the immediate need for this runway. Petitioners filed their appeal from the District Court to the Court of Civil Appeals on the 59th day, sixty being the limit. Thirty days are allowed for application for Writ of Error from the Court of Civil Appeals to the Supreme Court of Texas and Petitioners filed on the last day. Ninety days are allowed for the filing of a petition for writ of certiorari to this Court and again Petitioners filed on the last allowable day.

The Supreme Court of Texas took note of these delaying tactics and not only denied the application for a Writ of Error but also denied Petitioners the right to file a motion for rehearing on the denial of this application for a writ of error. The record contains Respondents' Motion to Advance which recites the facts upon which this action was based. Respondents have been powerless to prevent these

delays. In all courts—as here—Respondents have filed their answers within a few days in each Court rather than taking the time allowed for such responses. In addition, Respondents have asked the courts below to advance this case for immediate hearing and the courts have granted those motions because of the public interest involved.

I

No substantial Federal question is raised by the Petition.

The only question is whether when constructed and put in use the proposed parallel runway will cause a taking of Petitioners' property in violation of the Federal Constitution. The runway will be constructed far from Petitioners' property, entirely on city-owned land so no actual taking is involved. The alleged taking relates to what effect the proposed new parallel runway will have on Petitioners' property located from 2200 to 3000 feet from the end of a 8800 foot runway, from which runway aircraft will take off in 4500 to 5000 feet (R. 272, 517) and touch down about 750 feet from the approach end, stopping in about 3500 feet (R. 235, 477). No facts as to effect of use of the proposed runway on Petitioners' property are set forth in the record, and evidence of aircraft noise though offered was never related to Petitioners' properties. Since the aircraft will rise from 750 to 2000 feet in 4000 feet after take off (R. 291), it is obvious that the aircraft, if it passes over Petitioners' property at all in taking off, will do so more than one mile after take off and at a height in excess of 1000 to 2000 feet.

While it is contended that the decision herein conflicts with *United States* v. *Causby*, 328 U. S. 246 and *Griggs* v. *County of Allegheny*, 369 U. S. 84, this is not correct. Those

cases involved damage claims rather than a complaint seeking an injunction to prevent the building of an airport runway. And they also involved exact facts as to low flights over the property there involved, not pure speculation as in this case.

The record herein is devoid of any facts showing that airplanes using the proposed runway will even fly over Petitioners' property at any particular height. Unlike *Causby* and *Griggs* there is in fact no evidence that there will be any low flights directly over Petitioners' property. The speculation in their Petition that there will be such low flights over their land is therefore entirely without factual foundation in the record.

While anticipatory injury where damages are not adequate compensation might be a basis for injunctive relief, that situation is not this case. Here if any injury will be suffered by Petitioners it can be and must be adequately paid for in damages. *Armour & Co. v. City of Dallas*, 255 U. S. 280. There is in fact no taking of property of Petitioners by construction of the proposed runway and as is made clear in the next section of this brief any consequential damages that might be created by flights over Petitioners' land must be paid for by the City under the express language of the Texas Constitution. Under these circumstances no substantial federal question exists for review by this Court from the "assumed potential invasions" of Petitioners' rights. *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 324-325.

II

The Texas Courts correctly denied an injunction because any injury, if any, Petitioners will suffer can be adequately compensated for by damages.

It is well established by the decisions of this Court that no injunction will be issued where damages are an adequate remedy. *Armour & Co. v. City of Dallas*, supra; and *Arizona v. California*, 283 U.S. 423, 462. The Texas Constitution provides explicitly that under the facts of this case Petitioners have an express and adequate remedy at law for damages if after the construction of the runway the use thereof will cause them any damage. This fact is made crystal clear by the history of Article I, Section 17 of the Texas Constitution. That article up until 1876 read as follows:

> "No person's property shall be *taken* or applied to public use without just compensation being made unless by the consent of such person." (italics supplied)

The Texas Courts and Courts of other states which had similar provisions, interpreted this language of the Constitution and uniformly held that a person whose property was not actually taken physically had no redress or cause of action for consequential damages. In the light of this history, the 1876 Constitution provided different language and added the word "DAMAGED," so that Article I, Section 17, in part now reads as follows:

> "No person's property shall be taken, *damaged* or destroyed for or applied to public use without adequate compensation." (italics supplied)

See *G. C. & S. F. Railway Co.* v. *Eddins*, 60 Tex. 656. A further elaboration of the change that resulted from this amendment will be found in the case of *G. C. & S. F. Railway* v. *Fuller*, 63 Tex. 467.

From the earliest construction of Art. I, Section 17 of the Constitution, the courts have consistently held that if the work be of a public nature and it does damage to neighboring property, that the work or thing that causes the damage cannot be enjoined or abated but the injured party is relegated to an action at law for damages. *Baugh* v. *Texas and New Orleans Railroad Co.*, 80 Tex. 56. In that case, plaintiffs sued the railroad for damages because of the building of a railroad adjacent to their property on an elevated dump and the subsequent operation of the railroad. The Court in awarding damages for the inconvenience suffered thereby, stated the general rule on page 56 as follows:

> "When a nuisance is created by the construction of works in their nature permanent, and which, as sometimes occur in case of works for a public use, are not subject to be abated, the rule is that all damages resulting therefrom to property may be recovered in one action, and the proper measure of damages is the depreciation in the value of the property."

Texas thus goes further than *Richards* v. *Washington Terminal Co.*, 233 U.S. 546, in that Texas allows recovery irrespective of negligence.

The mere construction of the runway will not invade Petitioners' property. If there is damage to Petitioners' property from subsequent use of the runway it is clear that the Texas Constitutional provision just cited provides an adequate remedy by requiring adequate compensation for any damages suffered. And therefore under the *Armour*

and *Arizona* cases, *supra*, the decision below was clearly correct.

III

The proposed revenue bond issue to finance the building of the runway raises no Federal question.

The Texas Constitution nowhere requires that revenue or ad valorem tax supported bonds must be authorized by a vote of the qualified voters. That matter is wholly statutory. See Article 701, 1925 Revised Civil Statutes of Texas. *Moller* v. *City of Galveston*, 57 S. W. 1116.

Revenue bonds are not a debt under the Texas Constitution and their validity has been sustained by the Texas Supreme Court. *City of Dayton* v. *Allred*, 123 Tex. 60. Since the Texas Supreme Court has sustained the validity of the revenue bond statute no federal question exists. *Erie R.R.* v. *Tompkins*, 304 U.S. 64.

IV

Denial of a jury trial does not raise a Federal question in this case.

The facts in this case are undisputed. As the Courts below found there are no issues of fact. No one questions that the City will erect the runway or where Petitioners' property is located. There is no factual dispute that can now be determined by a jury. It is well established that Petitioners have no Federal Constitutional right under the Fifth or Fourteenth Amendments to a jury trial under the facts of this case. *Bauman* v. *Ross*, 167 U.S. 548; *Dohany* v. *Rogers*, 281 U.S. 362.

V

Conclusion

The decision of the Texas Court of Civil Appeals as set forth on pages A-2 through A-12 of the Petition, which was in effect affirmed by the Supreme Court of Texas without a written opinion (A-1), is in all respects correct and upon that opinion and for the foregoing reasons the Petition for Certiorari in this case should be denied.

Respectfully submitted.

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Because of the character of the Brief submitted by Respondent in opposition to Petitioners' Application for Writ of Certiorari, Petitioners, in fairness to this Court, feel obligated to make reply thereto lest the Court be misled by Respondent's wilful misrepresentation as to what is shown in the record of this case, and the falsity of deductions predicated thereon.

REPLY TO JURISDICTION AND QUESTION PRESENTED

Respondent, on the authority of *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, and *Arizona v. California*, 283 U. S. 423, contend that no substantial federal question is involved and that this Court is without jurisdiction. The cases cited do not sustain Respondent's position. In the *Arizona* case the Court refused jurisdiction (p. 463) on the ground that "But Wilbur *threatens* no physical interference with these projects." In the *Ashwander* case, the court held: that the facts alleged "did not give rise to justiciable controversy save as they had fruition in action of a definite and concrete character constituting an actual or *threatened* interference with the rights of the persons complaining. The judicial power does not extend to the determination of abstract questions." If the rule of these cases be applied to the instant case, it must be held that a justiciable controversy exists, and the question sought to be determined is not abstract. The Respondent City admits that it is building the runway to use, and as hereinafter demonstrated, such use will cause a "taking" of Petitioners' rights.

As to the "Question presented" by the Respondent, it ignores that portion of the Texas Constitution requiring payment in advance, or a deposit of security where rights of property are "taken".

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

The truth about the history of Love Field, as opposed to Respondent's statement at page 2 of its Brief, is shown in Respondent's verified Answer to Plaintiffs' Amended Petition (Tr. No. 59027-B, pp. 94, 95). Suffice it to say here that the original airport consisted of 320 acres, that it was operated and enlarged by the United States Government between 1940 and 1946, and that it presently occupies in excess of 1200 acres.

The Court's attention is directed to the verified Plaintiffs' First Amended Original Petition, on the question of the nature of the use of the land near the airport (Tr. No. 59027-B, p. 72) where in 1943 the Respondent's City Planner advised the Council that "Love Field is surrounded by commercial, industrial, and residential developments, and the cost of any extension would be very high if not prohibitive * * *." The statement of the Respondent that "All of Petitioners have purchased their property near the airport since 1947, is wholly false and unsupported by the record.

The Court's attention is directed to the fact that the "three-day evidentiary hearing", referred to by Respondent in its Brief, was a hearing had in connection with Petitioners' Application for a temporary injunction, *based upon their Original Petition which was subsequently abandoned.* The Petitioners have never been granted any evidentiary hearing on the allegations of their Amended Petition.

The Respondent through manipulation of the testimony of George Coker, Director of Aviation for the City of Dallas, attempts to demonstrate that jet planes will rise 1,000 to 2,000 feet in travelling 4,000 feet after takeoff; this statement is in absolute conflict with the testimony given by J. H. Alexander, whose testimony established, as a part of the City's case, that a 707 Boeing Jet would ascend only to a height of 1,150 feet in travelling a distance of 8,100 feet after leaving the ground; and that at a distance of 4,800 feet from the end of the runway it would pass over Rusk Junior High School at a height of 1,100 feet above the school; the same witness testified that the same type of plane, at a distance of 4,800 feet from the end of the runway would approach for landing at a height of 250' above said school.

For the Court's assistance a chart of the testimony relevant to landing and take-off of planes from the proposed runway is hereinafter set forth:

GRAPHIC CHART REFLECTING TESTIMONY AS TO

LANDINGS AND TAKE-OFFS

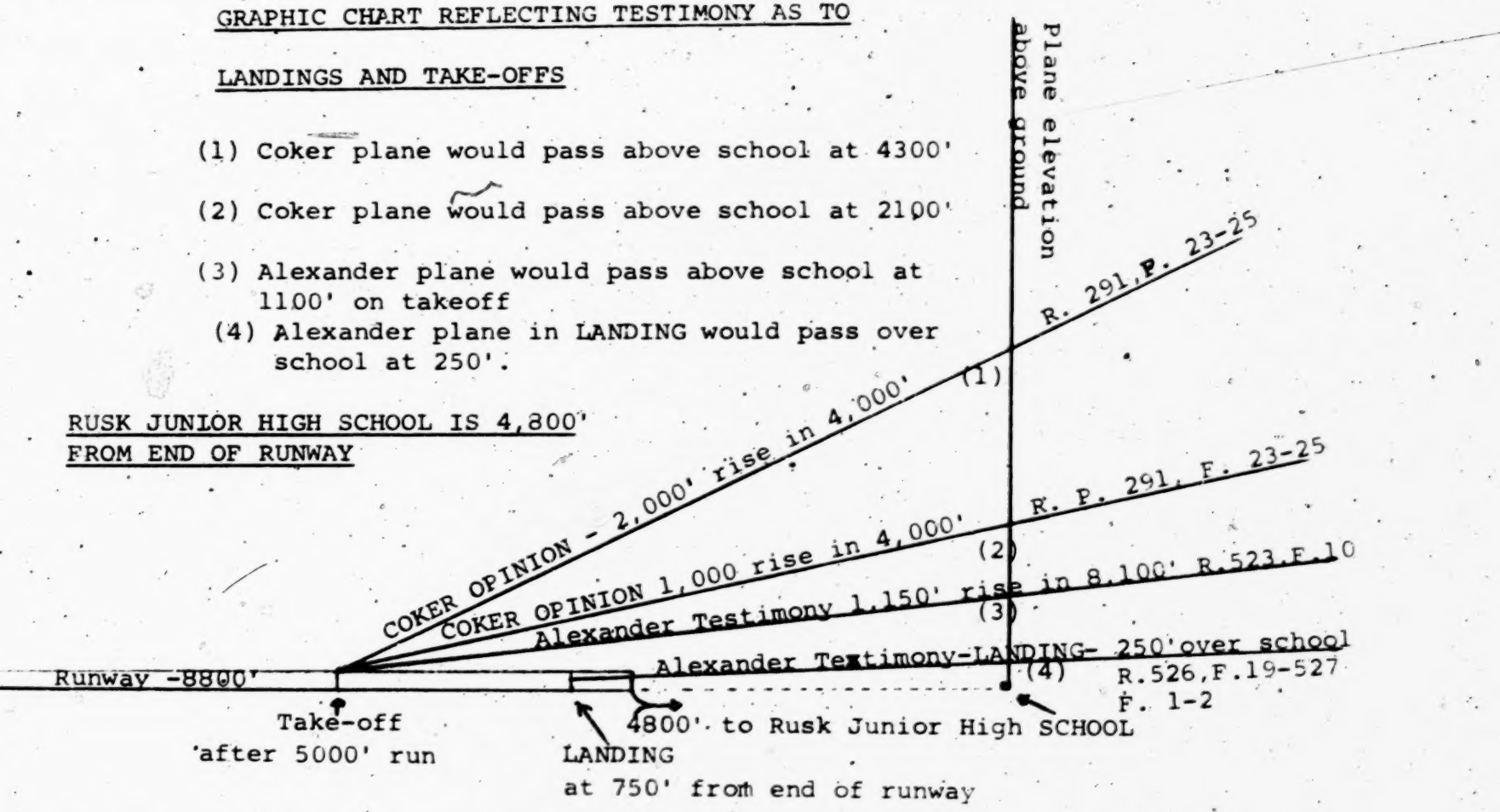
(1) Coker plane would pass above school at 4300'

(2) Coker plane would pass above school at 2100'

(3) Alexander plane would pass above school at 1100' on takeoff

(4) Alexander plane in LANDING would pass over school at 250'.

RUSK JUNIOR HIGH SCHOOL IS 4,800' FROM END OF RUNWAY



The Record shows that Coker's testimony was only an "opinion" by a man without qualifications to express the same; and that the testimony of Alexander, the City's other witness was based upon assumption of the operation of a jet at 60% capacity.

The plea of urgency for construction of the proposed runway, and the Respondent's frustrated discussion of "nuisance" law suits have no relevancy as far as the case at bar is concerned; fourteen judges can be equally wrong, and Respondent's attitude, as expressed in its condemnation of Petitioners' efforts to obtain their constitutional rights, is typical of its dictatorial disregard of the Petitioners' rights established by the Constitutions of the United States and Texas, and the Statutes of Texas.

PETITIONERS' ANSWER TO RESPONDENT'S CLAIM THAT NO SUBSTANTIAL FEDERAL QUESTION IS RAISED BY THE PETITION

This Point of the Respondent attempts to dispose of Petitioners claim by demonstrating that planes will not cross over Petitioners' property until "more than one mile after take off and at a height in excess of 1000 to 2000 feet." (Brief, p. 4.) Rights are seized in landing as well as in take-off of planes, and the Respondent's own evidence shows that planes will pass over Petitioners' property at heights below 190 feet, the altitude decreasing as the plane nears the runway. Respondent's position is untenable particularly since the

land rises to the northwest of the proposed runway and the height at which planes would pass over some of Petitioners' property would decrease accordingly. Petitioners further submit that they have consistently contended that these matters were disputed matters of fact upon which they were and are entitled to jury trial.

Independent of the testimony offered by Respondent, the record conclusively demonstrates that the flight of planes over Petitioners' homes will result in a "taking". Accepting for the purpose of argument Respondent's statement that Petitioners' property lies from 2200' to 3000' from the end of the runway, the glide angle established by Federal standards would permit the planes to cross Petitioners' property at a height of 40 to 60 feet above the ground or 25 to 45 feet above their homes. Moreover, the homes located 2200 feet from the runway proposed, are within the "clear zone" required by to kept free of obstruction by relevant Federal regulations.

Petitioners believe that since Respondent has failed to deny the case cited by the Court of Civil Appeals in its opinion *McCammon & Long Lbr. Co. v. T & B Ry. Co.* Petition herein, Apps. A-5, or to distinguish it, and has placed its reliance upon inferior court cases and Texas Supreme Court cases decided prior to those cited by Petitioners in their Petition for Writ of Certiorari, no further answer to Respondent's Brief is necessary.

Since the record discloses a "taking" the law cited by Petitioners is applicable, and they respectfully submit that their Application for Writ of Certiorari should be granted.

Respectfully submitted,

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